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Issue Date: 04 March 2005

CASE NO: 2004-LHC-00790

OWCP NO: 14-133706

In the Matter of:

ALBERT SODDEN,
Claimant,
v.

FOSS MARITIME COMPANY,
Permissively Self-Insured Employer,

**DECISION AND ORDER APPROVING STIPULATIONS FOR COMPENSATION
ORDER AND ATTORNEY FEES AND DENYING SECTION 908(f) SPECIAL FUND
RELIEF**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (the "Act"), and the regulations promulgated thereunder. A hearing was scheduled in the claim before me on September 15, 2004 in Seattle, Washington. The parties, including the Director, Office of Workers' Compensation ("OWCP"), appeared through the Office of the Solicitor, and affirmatively participated. Claimant and Employer entered into stipulated facts in support of an award of benefits memorialized in the court transcript, Employer's closing brief, and Claimant counsel's correspondence dated November 15, 2004. ALJX 1 and 3.¹

Employer submitted exhibits ("FX") 1-6 into evidence in support of the stipulated facts and the remaining issue and these exhibits were admitted with no objection.

The remaining issue concerning the appropriateness of Section 908(f) relief was deferred to allow the post-hearing depositions of Claimant and Employer's IME physician Richard G. McCollum, M.D. The October 15, 2004 deposition transcript of Claimant and the October 18, 2004 deposition transcript of Richard G. McCollum, M.D. were submitted and admitted into evidence as Employer's Exhibits CTR and MTR, respectively, with no objection. The record closed on November 18, 2004, with the submittal of Employer's proposed stipulations and closing brief, the Solicitor's closing brief, and Claimant counsel's November 15, 2004 letter expressing his approval of Employer's stipulations which are marked and admitted into evidence as ALJXs 1, 2, and 3, respectively, with no objection.

¹ Throughout this decision and order reference is made to administrative law judge exhibits "ALJXs" 1-3.

STIPULATED FINDINGS OF FACT

The parties stipulated as follows to all issues related to Claimant's entitlement to disability benefits, including ongoing payments of permanent partial disability compensation:

1. Claimant Albert Sodden ("Claimant"), was employed by Employer Foss Maritime Company ("Employer"), on July 20, 2000 as a line handler. On that date, Claimant sustained injury to his low back and left leg arising out of and in the course of his employment at Employer.
2. All filing and notice requirements of the Act were made in a timely manner and the Act applies to this claim.
3. The Claimant's average weekly wage as of July 20, 2000 was \$1,553.67.
4. Claimant has a retained earning capacity of \$353.67 per week.
5. Claimant has a wage loss of \$1,200 per week and a permanent partial disability compensation rate of \$800 per week.
6. Claimant's medical condition reached maximum medical improvement on December 17, 2002.
7. Employer paid a total of \$120,219.82 in temporary total compensation benefits to Claimant from August 7, 2000 through February 28, 2003.

Upon review of the record, there is substantial evidence supporting the foregoing Stipulations, and, accordingly, they are approved. ALJX 1 and 3; FX 1-6, CTR; and MTR.

FURTHER FACTUAL FINDINGS AND CONCLUSIONS OF LAW

On May 17, 1990, Claimant injured his back while unloading logs. Claimant was vague about the details of how this injury occurred when he testified at his deposition. Claimant stated that he really did not remember what happened to cause his back injury in 1990 since it was 14 years ago. CTR at 20.

After Claimant's injury in 1990, he was treated by Dr. Robert Thompson of Group Health Cooperative. Claimant underwent physical therapy from January 3, 1991 to May 29, 1991. FX 2 at 1-8. The therapist wrote "HNP probable" on the Claimant's treatment records. FX 2 at 6. According to Employer's medical expert, Richard G. McCollum, M.D., "HNP" is shorthand for "herniated nucleus pulposus" or "ruptured disc." MTR at 32.

Claimant's back condition continued to improve after the 1990 injury until a medical evaluation was necessary for Claimant to continue his physical therapy. FX 2 at 18. On May 29, 1991, Dr. Thompson wrote at the bottom of the treatment record his diagnosis of "Herniated disc L5-S1[.] Cont PT." *Id.* There was no evidence, however, that Dr. Thompson performed any objective tests such as a medical resonance imaging test (MRI), a CAT scan, a myelogram, or an X-ray in support of this diagnosis. Moreover, Dr. Thompson also wrote "LBP [low back pain] slowly improving, c/ PT [continue physical therapy]... no exam today" to indicate that he did not perform any physical examination of Claimant on May 29, 1991. *Id.* (emphasis in original).

Claimant recalled receiving therapy for six to eight months after his 1991 work injury to his low back. CTR at 22. Soon after completing his therapy in 1991, Claimant returned to work full-time. CTR at 23. Claimant testified at his deposition that he returned to full duty without physical restrictions, continuing medical treatment, or medications. There was no evidence presented showing that Claimant received any permanent disability award for the 1990 injury. CTR at 22-26.

In February 21, 2001, Claimant's treating physician, Dr. Robert K. Thompson noted that Claimant's past medical history was significant only for a 1958 right index finger amputation. Dr. Thompson omitted reference to any alleged preexisting back injuries. FX 3 at 2 and 4.

For the next four years, Claimant returned to work without medical treatment. CTR at 25-26. Claimant testified that he could not do all the jobs that he could perform before his 1990 injury, but he could not state how much income he lost as a result. CTR at 26.

On March 15, 1995, Claimant was struck in his left calf by a three or four inch rope with enough force that he was knocked three to four feet and landed on his left side. CTR at 31; FX 1 at 13. Dr. Thompson treated Claimant on March 21, 1995 and found him to be very tender, ecchymotic, and swollen at his left calf muscle with full cervical spine range of motion. FX 1 at 13. Dr. Thompson also found Claimant's rotator cuff had a full range of motion and full strength. *Id.* Dr. Thompson assessed Claimant's condition as having a hematoma and contusion on his left calf with a strain of his cervical spine and left shoulder. *Id.* He prescribed heat, rest, physical therapy but no medication for Claimant. *Id.*

Claimant reported that the fall in 1995 caused him to be off work for a period of almost four months, he believes." FX 3 at 3. When asked how his back was affected by his 1995 injury, Claimant responded that "I don't think I worried about my back as much as I did my leg. It ached." CTR at 31. Claimant wore a cast on his left leg for five weeks and had to use crutches but eventually his leg healed. *Id.* Claimant stated that he off work for three or four months while his medical records indicate that he was to return to work in July 1995. FX 1 at 21.

After Claimant's March 1995 leg injury, he returned to work full time and he did not receive any medical treatment or medications for injuries. CTR at 32-33. Claimant did not file a claim for permanent disability because his leg was "good to go." CTR at 41. Claimant's only visit to Group Health and Dr. Thompson from July 1995 to 2000 was to have his blood pressure checked and for a physical on April 2, 1996. FX 1 at 22. At his "Health maintenance" visit on that date, Claimant complained of an external ear inflammation, jock itch, and feeling tired. *Id.*

Claimant did report having some low back pain, particularly when he had to lean over to work on a crane and was thinking about retiring at that time. *Id.* Dr. Thompson assessed Claimant as having only external otitis by history and blood pressure in poor control. *Id.* No mention is made of any lingering significant back problems. *Id.*

Claimant resumed regular physical labor after recovering from each of his previous back injuries in 1991 and 1995. He performed his job duties without any medical restrictions, continuing medical treatment, or medication. Claimant stated that his income as a longshoreman was steady for the next four years as he testified that he made between sixty and eighty thousand dollars in the years 1996 through 1999. CTR at 37.

Claimant was injured on July 20, 2000 and stopped work on August 6, 2000. Stipulated Fact No. 1; FX 1 at 24. Claimant fell on his back, worked one day thereafter but he could not handle the work due to his injured back and did not return to work. CTR at 40-41. On August 7, 2000, Claimant first sought treatment with Dr. Thompson for his July 2000 back injury. At that visit, Dr. Thompson made objective findings of Claimant's tender lumbar spine, referred Claimant for an X-ray and physical therapy but opined that Claimant had never been treated for his then-present condition or a similar back condition. FX 1 at 23. Moreover, Dr. Thompson also opined that there was no preexisting impairment of Claimant's injured lumbar spine area and that no preexisting condition would complicate treatment or retard Claimant's recovery. *Id.*

On May 9, 2001, prior to his back surgery, Dr. Edward Hoffman, a neurosurgeon, examined Claimant at the request of Employer. Dr. Hoffman was to render a second opinion as to whether Claimant needed lumbar decompression surgery. FX 1 at 67. At that time Dr. Hoffman discussed Claimant's medical history and was told by Claimant that he had no prior injuries to, or problems with his lower back prior to the industrial injury of July 20, 2000, nor did he experience problems with his lower extremities. FX 1 at 70. Claimant further told Dr. Hoffman that he had worked as a longshoreman for 40 years and that such work entailed a considerable amount of heavy lifting, twisting, and bending but that in spite of this, Claimant had no complaints prior to the July 20, 2000 fall regarding his low back or lower extremities. *Id.* At that examination, Dr. Hoffman opined that Claimant was asymptomatic prior to his July 20, 2000 injury. FX 1 at 77.

On November 27, 2001, Claimant saw Dr. Joseph Arguelles for a second opinion concerning his back pain. FX 1 at 79. At that time, Claimant reported his past medical history as including only his high blood pressure [hypertension], his lost right index finger in 1958 with no reference to any preexisting low back or sciatic nerve problems. *Id.*

Claimant's medical condition from his July 2000 injury reached maximum medical improvement on December 17, 2002. Stip. Fact No. 6.

During a post-surgical medical examination by Dr. Reese on October 8, 2003, Claimant stated that after his 1990 injury, he used an over-the-counter back corset and used it occasionally whenever he was having back pain at work. FX 3 at 3. For the first time, Claimant stated that he had some back problems intermittently up and through the time of his July 20, 2000 injury. *Id.*

On April 30, 2004, Claimant was examined by Employer expert physician, Richard G. McCollum, M.D. and reported that on July 20, 2000, the only area injured was Claimant's low back. FX 4 at 2. Claimant also reported that he had one prior injury to his low back in the early 1990s, which he earlier forgot about, and Claimant stated that his sciatic nerve went out on his left side, and that was also an on-the-job injury. *Id.* Claimant further stated to Dr. McCollum that he got over this 1991 work-related back injury entirely and was symptom free. *Id.* Claimant also related his 1995 injury to his left leg, strained cervical spine, and strained left shoulder to Dr. McCollum and Claimant told Dr. McCollum that he also got over that injury entirely. *Id.*

Later at his April 2004 examination of Claimant, Dr. McCollum pointed out to Claimant that Dr. Reese's report of October 2003 stated that after the early 1990s injury, Claimant continued to have back problems up until the July 20, 2000 injury. FX 4 at 2. Claimant then changed his medical history reporting to Dr. McCollum and stated that he did have back pain and stiffness up until the July 20, 2000 injury. *Id.*

On October 15, 2004, at his deposition when the only open issue involved section 8(f) relief, Claimant was asked about his statements to Dr. Hoffman in May 2001 and any preexisting injuries. CTR at 43. Claimant stated that because he didn't remember it, he got over his 1990 injury. *Id.* Claimant further testified that he had a sciatic nerve that flared up every now and then and that he did not remember anything until someone asked him about 1990. *Id.* Claimant went on to state that the question made him stop and think that he does not keep a record of every little problem he had. *Id.* He concluded by stating that he had a record in his book but that his books were gone. *Id.*

Credibility

In arriving at a determination of the Section 8(f) issue in this matter, I am entitled to determine the credibility of the witnesses, weigh the evidence, and draw my own inferences from it; furthermore I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988). In addition, as the factfinder, I am entitled to consider all credibility inferences, and can accept any part of an expert's testimony or reject it completely. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988)

Claimant's testimony about his physical condition from 1991 until the date of his latest work injury, July 20, 2000, is inconsistent and contradictory when one compares his reported medical histories prior to his visit with Dr. Reese in October 2003 to his statements on and after that date. I find that his communicated medical histories prior to October 2003 which consistently omit reference to any significant preexisting permanent partial disability are more credible than Claimant's conflicting medical histories thereafter when this claim was being controverted. Moreover, Claimant's full time work history, his earnings history including occasional overtime, his lack of medical treatment, medical restrictions, or medications are more consistent with his description of his medical histories prior to October 2003.

Accordingly, I reject Claimant's testimony as unreliable and not credible with respect to any alleged preexisting back condition communicated to physicians beginning on October 9, 2003.

Section 8(f)

Employer argues that it is entitled to relief from paying benefits for Claimant's unscheduled back injury, as Claimant was awarded benefits for more than 104 weeks, as well as for the continuing benefits for his back condition, as Employer sought relief from benefits for Claimant's "overall condition." Specifically, Employer argues that prior to Claimant's work-related July 20, 2000 injury, he had injured his low back and leg in 1990 and 1995 which resulted in significant periods of temporary total disability and which caused him ongoing difficulties on his return to work. ALJX 1 at 2. Employer further argues that since Claimant's return to work in 1991, he wore a back brace when working and that Claimant's amputated right index finger and impaired right hand also have caused Claimant additional disability and combine with his most recent injury "to create a greater degree of permanent disability." *Id.*

The Director asserts that Employer cannot establish its entitlement to Section 8(f) relief for the Section 8(c)(21) award and he argues that Employer has not done so.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

As to the third element, when an employee is permanently partially disabled, but not totally disabled, the employer must make the additional showing that the ultimate permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 185 (4th Cir. 1993). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Marine Power & Equipment v. Department of Labor*, 203 F.3d 664, 668 (9th Cir. 2000); *Seattle v. Lane Construction Corp.*, 15 BRBS 148 (1982).

The employer bears the burden of establishing that the criteria for section 8(f) relief have been met. I have discretion to accept or reject all or any part of the presented medical evidence. As the trier of fact, I am not bound to accept the opinion or theory of any particular medical

examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Circuit 1962). If the disability is partial as it is presented here, the medical evidence must explain (1) why the disability is not due solely to the second injury, and (2) why the disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. *See 20 C.F.R. § 702.321(a)(1)(iv)*. In this case, Employer alleged that Claimant's prior low back impairment and his amputated right index finger entitles it to Section 8(f) relief.

1. *Claimant Had No Preexisting Permanent Partial Disability*

Employer has not met its burden to show that Claimant had a preexisting permanent partial disability. The fact that Claimant previously sustained back and hand injuries does not, standing alone, establish that he had a preexisting permanent partial disability. *See Director OWCP v. Belcher Erectors*, 770 F.2d 1220 (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). A medical condition need not cause economic disability to constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). However, an employer must show not merely that the employee was previously injured, but that the injury was in fact disabling. *Director, OWCP v. Belcher Erectors*, *supra*. 678 F.2d at 840.

In this case, I find that prior to his July 20, 2000 injury Claimant did not have a manifest, physically disabling condition serious enough to motivate a cautious employer to discharge him rather than incur the possibility of increased liability. Claimant had not filed or received any disability award for a preexisting claim. Claimant himself, on more than one occasion, did not mention any preexisting condition when giving his medical history to various physicians. For example, Claimant's treating physician, Dr. Robert K. Thompson noted on February 21, 2001 that Claimant's past medical history was significant only for a 1958 right index finger amputation omitting reference to any alleged preexisting back injuries. FX 3 at 2 and 4. Furthermore, on August 7, 2000, soon after the July 2000 injury, Dr. Thompson made objective findings of Claimant's tender lumbar spine, referred Claimant for an X-ray and physical therapy but opined that Claimant had never been treated for his then-present condition or a similar back condition. FX 1 at 23. Moreover, Dr. Thompson also opined that there was no preexisting impairment of Claimant's injured lumbar spine area and that no preexisting condition would complicate treatment or retard Claimant's recovery. *Id.*

Similarly in May 2001, Claimant's treating neurosurgeon, Dr. Hoffman, discussed Claimant's medical history and was told by Claimant that he had no prior injuries to, or problems with his lower back prior to the industrial injury of July 20, 2000, nor did he experience problems with his lower extremities. FX 1 at 70. Claimant further told Dr. Hoffman that he had worked as a longshoreman for 40 years and that such work entailed a considerable amount of heavy lifting, twisting, and bending but that in spite of this, Claimant had no complaints prior to the July 20, 2000 fall regarding his low back or lower extremities. *Id.* At that examination, Dr. Hoffman opined that Claimant was asymptomatic prior to his July 20, 2000 injury. FX 1 at 77.

In addition, on November 27, 2001, Claimant saw Dr. Joseph Arguelles for a second opinion concerning his back pain. FX 1 at 79. At that time, Claimant reported his past medical history as including only his high blood pressure [hypertension], his lost right index finger in

1958 with no reference to any preexisting low back or sciatic nerve problems. *Id.* Finally, when Claimant initially met with Employer's hired expert, Dr. Richard G. McCollum in April 2004, Claimant stated to Dr. McCollum that he got over this 1991 work-related back injury entirely and was symptom free. FX 4 at 2. Claimant also related his 1995 injury to his left leg, strained cervical spine, and strained left shoulder to Dr. McCollum and Claimant told Dr. McCollum that he also got over that injury entirely. *Id.*

I reject, as unqualified, the physical therapist's diagnosis of HNP and Dr. Thompson's diagnosis of "herniated disc" from May 29, 1991 as it is conclusory and not based on any objective evidence such as a physical examination, MRI, or X-ray. As referenced above, I also discount and reject Claimant's changed medical history reporting to Dr. McCollum later at the April 30, 2004 examination where Dr. McCollum pointed out to Claimant a lone reference in Dr. Reese's report of October 2003 mentioning back pain and stiffness up until the July 2000 injury on grounds that Claimant's comment to Dr. Reese was insignificant as a manifest, physically disabling condition as Claimant continued to work and because Dr. McCollum was hired by Employer and did not rely on any objective findings in support of any preexisting permanent partial disability.

Even so, Claimant was asked at his October 15, 2004 deposition about his statements to Dr. Hoffman in May 2001 and any preexisting injuries. CTR at 43. Claimant characterized his preexisting health as little problems rather than manifest physical disabilities *Id.* After Claimant's March 1995 injury, he returned to work full time and did not receive any medical treatment or medications for his injuries. CTR at 32-33.

As a result, I find that the credible medical evidence, Claimant's own statements, and his full-time work history demonstrate that Claimant's preexisting injuries, if any, were not severe and significant enough to motivate a cautious employer not to continue to employ him. Claimant's lost right index finger in 1958 did not create any permanent partial disability that prevented him from doing longshore work. Employer has not affirmatively established that Claimant had a preexisting permanent partial disability.

2. No Preexisting Disability Was Manifest To Employer Prior to the July 2000 Injury

Assuming *arguendo* that Claimant had a preexisting permanent partial disability before his July 2000 work-related injury, this preexisting condition was not diagnosed or manifest to Employer before Claimant's July 2000 injury.

The physicians who examined Claimant after his July 2000 work injury diagnosed a lumbosacral strain/sprain superimposed on a preexisting degenerative disc disease and spinal stenosis. FX 3 at 8; FX 4 at 10. These conditions, however, were not diagnosed and, therefore, not manifest before Claimant July 2000 injury. Employer expert physician, Dr. McCollum, acknowledged that based on the medical records he was provided, there was no diagnosis of degenerative disc disease prior to Claimant July 2000 injury. MTR at 23-24. Dr. Thompson's May 1991 diagnosis of a "herniated disc" cannot objectively establish a manifest preexisting permanent back condition for the reasons stated above.

Although Claimant had prior back injuries before his July 2000 injury, he was released to work each time and did not file any claim for permanent disability. The credible evidence in this case shows that Claimant's back condition was asymptomatic until his July 2000 injury. Furthermore, Employer did not treat Claimant any differently after the earlier back injuries. Claimant resumed regular physical labor including overtime without restrictions. CTR at 37. I find that Claimant did not suffer any permanent reduction in wage-earning capacity from any injury prior to July 2000. See also CTR at 37.

Consequently, there were no permanent partial disabilities manifested to Employer prior to Claimant's July 2000 injury.

3. Conclusion

In view of my findings and determination that Claimant did not suffer from a serious, lasting preexisting impairment and, even so, it was not manifest to Employer prior to the July 2000 injury, I need not address the question of material contribution. I find that Employer is not entitled to Section 8(f) relief. Consequently, I deny relief from the Special Fund and Employer's application for Section 908(f) relief is **DENIED**.

ORDER

1. Employer Foss Maritime Company shall pay to Claimant temporary total disability benefits commencing on July 21, 2000 through December 17, 2002 at the maximum compensation rate of \$901.28 per week;
2. Employer shall pay Claimant \$800.00 per week for his permanent partial disability compensation rate, commencing December 18, 2002 through the present and continuing;
3. Employer shall receive a credit for the \$120,219.82 prior disability compensation benefits paid to Claimant;
4. Employer shall pay the Law Office of Matthew S. Sweeting the sum of \$12,500.00, representing reasonable attorney fees and expenses at Mr. Sweeting's effective hourly rate of \$225 for representation of Claimant's claim; and
5. The District Director shall make all calculations necessary to carry out this order.

A

Gerald M. Etchingham
Administrative Law Judge

San Francisco, California